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No. 96-1925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CATERPILLAR INC.,
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated LOCAL UNION 786,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 302(c)(1) of the LMRA exempts employer payments of wages and benefits to full-time union officials from the otherwise criminal proscriptions of Section 302(a) because those payments are negotiated during collective bargaining and are "by reason of" the union officials' past service with the employer?

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INTEREST OF AMICUS CURIAE

COLLE is a national association of employers formed in 1981 to provide legal support to the business community through the filing of *amicus curiae* briefs with the courts and the National Labor Relations Board on those issues arising under the federal labor statutes which affect a broad cross-section of industry.[1] COLLE was formed to

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[1] This brief is being submitted by the Council on Labor Law Equality ("COLLE"), as amicus curiae in support of petitioner. The parties have consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae

create a specialized and continuing business community resource to maintain a balanced approach in the formulation and interpretation of national labor policy. Over the years, COLLE has participated as an *amicus curiae* in cases of major significance before the National Labor Relations Board and the federal courts, including the Supreme Court. *See, e.g., International Bhd. of Elec. Workers v. Colorado-Ute Elec. Ass'n, Inc.*, No. 91-1284 (1992); *Lechmere, Inc. v. NLRB*, No. 90-970 (1992); *Building & Constr. Trades Council v. Altemose Constr. Co.*, No. 85-82 (1986); *NLRB v. Transportation Management Corp.*, No. 82-168 (1983).

This case involves employer payments to full-time union representatives pursuant to Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186. The resolution of the issues raised in this case is significant for COLLE, its member, Caterpillar Inc., as well as its other member companies, because the Third Circuit *en banc* fashioned an overly permissive interpretation of Section 302 that permits employer payments to full-time union officials "by reason of" the union officials' past service with the employer and because those payments were negotiated in collective bargaining. *Caterpillar, Inc. v. United Auto Workers of Am.*, 107 F.3d 1052 (3d Cir. 1997). None of the other Courts of Appeals that has interpreted the Section 302(c)(1) exemption—including the Second, Fifth, Sixth, Seventh, and Eleventh Circuits—has expanded the exemption to this extent.

An equally important concern is that under Section 302(d) of the LMRA, 29 U.S.C. § 186(d), violation of Section 302(a) subjects employers to criminal penalties. *Cf., United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994) (imposing criminal penalties against union officials for violating Section 302(a)), *cert. denied*, 115 S. Ct. 1312 (1995); *Toth v. USX Corporation*, 883 F.2d 1297 (7th Cir.) ("The proper remedy for the situation if bribery was indeed involved is prosecution of the company and union officials at fault, not judicial approval of the bribery scheme"), *cert. denied*, 493 U.S. 994 (1989). In light of the vastly different interpretations that the courts have given to the Section 302(c)(1) exception, employers have no uniform federal guidance regarding their potential criminal exposure.

COLLE certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than COLLE and their counsel made any monetary contribution to the preparation or submission of this brief.

It is COLLE's position that an employer's payment of wages to full-time union officials who perform no work for the employer is contrary to the plain language of Section 302(a). Because Caterpillar's payments were not generally applicable to former employees "as compensation for, or by reason of" their past service with the employer, these payments could not have been saved from illegality under the Section 302(c)(1) exemption. In addition, regardless of a union's strength during collective bargaining, activity that is unlawful cannot be legitimized simply because an employer "agreed" to it in negotiations.

STATEMENT OF THE CASE

Petitioner Caterpillar Inc. (Caterpillar) and Local 786, United Automobile Aerospace and Agricultural Implement Workers of America (UAW or Respondent) have been parties to collective bargaining agreements since 1954. (Pet. App. 4a). Until 1973, the agreement contained a "no-docking" provision which permitted employees who served as union stewards and committeemen to devote part of their work week to union business without losing pay or benefits. In 1973, the parties revised the collective bargaining agreement to allow union committeemen working full-time for the union to be maintained on the company's payroll, to be paid wages and benefits by Caterpillar. These full-time union officials

(Committeemen) performed no work for Caterpillar, conducted all business from the union hall, and were not under the direct control of Caterpillar except with regard to time reporting. (Pet. App.. 4a).

In 1991, after the collective bargaining agreement expired, a nationwide labor dispute ensued between the parties. A year later, Caterpillar informed the Union that it would cease paying the Committeemen and questioned the legality of such payments to full-time union officials who performed no work for Caterpillar. Caterpillar maintained that the payments violated Section 302 of the Labor-Management Relations Act of 1947 (LMRA). Pet. App. 4a. As a result, the UAW filed an unfair labor practice charge with the National Labor Relations Board (NLRB) alleging that Caterpillar had refused to bargain in good faith, as required by Section 8(a)(5) of the National Labor Relations Act (NLRA), before rescinding the payments. A month later, Caterpillar filed this action in the U.S. District Court for the Middle District of Pennsylvania seeking a declaratory judgment that the payments violated Section 302. Pet. App. 4a.

The district court stayed the proceedings pending resolution of the union's unfair labor practice charges. Although the NLRB's administrative law judge (ALJ) found that the payments violated Sections 8(a)(5) and 8(b)(2) of the NLRA and questioned their validity under Section 302, the ALJ recommended dismissal of the union's charge. Thereafter, the district court granted Caterpillar's request for declaratory relief and ruled that the payments in question violated Section 302 of the LMRA and were not within its Section 302(c)(1) exception. Pet. App. 63a. The UAW appealed the ruling to the Third Circuit which, in a 9-3 *en banc* opinion, overruled its own precedent (*Trailways Lines, Inc. v. Trailways Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986)) and reversed the district court's ruling. Pet. App. 1a-12a.

SUMMARY OF ARGUMENT

Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186 (Section 302) makes it unlawful for an employer to pay or agree to pay money or any other thing of value to union officials who represent the employer's workers. A limited exception to Section 302 exists for employer payments to a union representative who is a current or former employee "as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1). There is no exception for such payments merely because they are included in a collective bargaining agreement or negotiated at arms-length and in good faith. Section 302 is written *in malum prohibitum* and requires no "corrupt purpose" or "evil intent." *United States v. Ryan*, 350 U.S. 299, 305 (1956).

Section 302 is part of a comprehensive reform of federal labor law enacted in 1947 to prohibit featherbedding, extortion, bribery, payoffs and other corrupting practices, such as collusion, which are inimical to collective bargaining, or which might create conflicts of interest that impair the ability of employee representatives to exercise their fiduciary responsibilities solely in the interests of those whom they represent. *Arroyo v. United States*, 359 U.S. 419, 424-25 (1959).

In 1959, Congress broadened the proscriptions of Section 302 to make it clear that no person in a position of trust should "enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve," and that "no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." S. Rep. No. 187 (Conference Rept.), 86th Cong., 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330-31.

There is no dispute that on the face of Section 302(a), the petitioner Caterpillar's wage and benefit payments

to full-time union representatives who perform no work for the employer are unlawful. *Caterpillar Inc. v. United Auto. Workers of Am.*, 107 F.3d 1052, 1054 (3d Cir. 1997). The challenged payments clearly create the type of conflict-of-interest which Congress intended to proscribe when it enacted Section 302. *Cf. Caterpillar v. United Auto. Workers of Am.*, 107 F.3d at 1057. The payments are not saved from illegality because they were negotiated at arms-length and not part of secret, back-room deals between the parties. Congress understood that even negotiated payments from employers might "degenerate into bribes". See 93 Cong. Rec. 4805 (1947), *reprinted in* II NLRB Legislative History of the Labor-Management Relations Act, 1947, at 1305 (1948).

The Third Circuit's new overly-expansive interpretation of the Section 302(c)(1) exception is far more permissive than any other circuit and, in effect, swallows the proscriptions in Section 302(a). The Third Circuit creates a "full-time union official" exception, which merely requires that the union official have once worked for the employer. As a result, what has been a rare practice of employer payments to full-time union officials, now may open the door to the types of conflict-of-interest abuses that Congress proscribed in 1947 and 1959.

Reversing the Third Circuit's decision and proscribing the challenged payments would not disturb typical "no-docking" arrangements in industry nor lead to massive dislocations in labor-management relations; to the contrary, allowing the Third Circuit's "full-time union official" exception to stand would create uncertainties and future litigation under other workplace laws arising out of the definitions of "employee."

It is for Congress, not the courts, to create exceptions or qualifications at odds with the LMRA's plain terms. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947).

ARGUMENT

Fifty years ago, Congress passed the Labor-Managment Relations Act of 1947, 29 U.S.C. §§ 151-87, heralding in a new era of labor-management relations. In addition to setting forth the rights of unions, employers, and employees, the law also delineated the boundaries of lawful and unlawful payment arrangements between employers and unions in Section 302 of the Act. 29 U.S.C. § 186.

Section 302 arose out of legislative concern that employer payments for pension and welfare benefits often were diverted to the benefit and personal use of union leaders or as resources to be used during a strike. Congress enacted Section 302 as part of a comprehensive reform of federal labor law and policy, to deal specifically with practices inimical to the integrity of collective bargaining, and to prevent practices which, if unchecked, could lead to bribery and extortion by union officials or which, by collusion, might impair the impartiality of employee representation. *Arroyo v. United States*, 359 U.S. 419, 424-25 (1959). Congress therefore made it unlawful, except in very narrow cicumstances, for employers to pay money or any other thing of value to union officials:

> It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce; . . . .

29 U.S.C. § 186. Based simply on a plain reading of Section 302(a), all employer payments to union officials are unlawful.

Section 302(c), however, contains several exceptions to the prohibitions found under Section 302(a). The exception at issue in this case is found in Section 302(c)(1). In relevant part, it provides that it is not unlawful for an employer to pay money or other thing of value to any representative of his employees who is a present or former employee "as compensation for, or by reason of, his service as an employee of such employer[.]" 29 U.S.C. § 186(c)(1). Section 302(c)(1) does not contain an exception that permits employers to use the collective bargaining process to make payments that would not otherwise be permitted under Section 302.

For decades, unions have tested the boundaries of the criminal statute by seeking to negotiate various payment arrangements, which employers have challenged in the courts. In general, the courts have upheld payment arrangements where employees take a few hours out of the workday or workweek to perform work for the union. These agreements are known as "no-docking" arrangements and they are not being challenged here.[2]

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[2] As the Third Circuit observed, "no-docking arrangements have been consistently upheld by the courts as not in violation of § 302 because the employer's payment is to current employees as compensation for, or by reason of, their service to the employer." *See NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 854-56 (5th Cir. 1986); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046 (2d Cir. 1986); *Herron v. International Union, UAW*, 73 F.3d 1056 (10th Cir. 1996), *aff'g & adopting dist. ct. analysis*, 858 F. Supp. 1529, 1546 (D. Kan. 1994); *Communications Workers v. Bell Atlantic Network Servs., Inc.*, 670 F. Supp. 416, 423-24 (D.D.C. 1987); *Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458, 461 (N.D. Ill. 1970). Such practices are also permitted under Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2) ("*Provided*, That . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay") and Section 2, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth ("*Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees, from conferring with management during working hours without loss of time. . . .").

The courts have rejected arrangements, however, where:

- payments are made to individuals who are not employed by the employer, *see, e.g., Reinforming Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258 (6th Cir. 1981) (because industry steward could not be characterized as an employee of Bechtel, any contributions by Bechtel to the industry steward fund would violate the terms of Section 302(a));
- payments were not compensation for or by reason of the employees' service to the employer, *see, e.g., Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986) (ruling unlawful union's attempt to have employer make contributions to pension trust funds on behalf of employees who took leaves of absence to accept full-time positions with the union or its parent international because contributions were not made for past service to the employer);
- the union sought retroactive pension service credit for former employees on leave working full time for the unions; *see, e.g., Toth v. USX Corporation*, 883 F.2d 1297 (7th Cir.) (Section 302(c)(1) does not exempt an employer's leave of absence policy awarding retroactive pension service credit to former employees who were on leave working full-time as union officials because payments are not made for past services rendered by the former employee while an employee), *cert. denied*, 493 U.S. 994 (1989); and,
- the employer agreed to extend its leave of absence policy to enable union leaders to obtain company

provided pensions even though they had been working full time for years as a union official, *see, e.g., United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994) (affirming imposition of criminal penalties against union officials who obtained in collective bargaining retroactive extensions of their leave of absence from the employer so as to qualify them for employer-provided pensions, even though they had not worked for the employer for many years), *cert. denied*, 115 S. Ct. 1312 (1995).

In each of these cases, the union's arrangement fell outside the Section 302(c)(1) exemption.

In the present litigation, the UAW, during collective bargaining, sought to have Caterpillar pay the wages and fringe benefits of full-time union officials who performed *no* services at all for Caterpillar. The union officials were on leave of absence and would be paid at the same rate as when they last worked on the factory floor. *Caterpillar*, 107 F.3d at 1053. They conducted business from the union hall, performed no duties directly for Caterpillar, and were not under the control of Caterpillar except for time reporting services. *Id.* The Union contended that because the employees on leave for union business worked for Caterpillar in the past, the payments satisfied the exception under Section 302(c)(1) for payments made "by reason of" the employees' past service to Caterpillar. This exception for past service has come to be known as the "by reason of" exception to Section 302. The Third Circuit overruled its prior precedent in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986), and became the first court to hold that Section 302(a) was not violated by an agreement that placed full-time union officials in a *paid* leave of absence status. In addition, the Third Circuit found significant the fact that Caterpillar and the

union agreed to this arrangement as part of the collective bargaining process.

COLLE supports the petitioner Caterpillar in this case for several reasons. First, its employer members suffer potential exposure to criminal penalties for violations of Section 302(a). Second, the collective bargaining process will be facilitated by Supreme Court guidance clearly defining the scope of the Section 302(c)(1) exemption. Third, the lack of uniformity among the circuits regarding what types of payments from employers to union officials are lawful under Section 302 of the LMRA and what the proper test should be for interpreting the Section 302(c)(1) exemption cause significant uncertainties for employers with multi-state collective bargaining agreements. The same collective bargaining provision may be lawful in one jurisdiction and unlawful in another.

I. LEGISLATIVE HISTORY MAKES CLEAR THAT IT IS UNLAWFUL FOR AN EMPLOYER TO PAY FULL-TIME UNION OFFICIALS WHO PERFORM NO WORK FOR THE EMPLOYER, REGARDLESS OF WHETHER THE ARRANGEMENT IS NEGOTIATED IN COLLECTIVE BARGAINING

Section 302 is a conflict-of-interest statute that was designed to eliminate practices that have the potential for corrupting the labor movement. *Caterpillar Inc. v. United Auto. Workers of Am.*, 107 F.3d at 1057 (majority opinion) and 1059 (dissent); *see United States v. Phillips*, 19 F.3d at 1574. As reflected in the legislative history, Section 302 was introduced on the floor of the Senate as a proposed amendment to S. 1126, 80th Cong., 1st Sess. (1947), a bill to amend the NLRA as originally enacted in 1935. The proposed amendment (i.e., Section 302) read, in pertinent part, as follows:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> (c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; . . . .

93 Cong. Rec. 4704 (1947). The remainder of subsection (c) listed additional not currently relevant categories of exemptions. In introducing this proposed amendment, Senator Ball, one of its authors, stated that one of the purposes of Section 302 was to ensure that payments by employers to the unions would not "degenerate into bribes." 93 Cong. Rec. 4805 (1947). Other senators echoed this understanding. *See, e.g., id.* (statement of Senator Byrd); *id.* at 4877 (statement of Senator Taft). *See also Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (remarking that "corruption of collective bargaining through bribery of employee representatives by employers, . . . extortion by employee representatives, and . . . possible abuse by union officers of the power which they might achieve if welfare funds were left to this sole control" were the congressional concerns that led to the enactment of Section 302) (footnotes omitted).

It is quite clear from the legislative history that Congress understood that even negotiated payments from employers might "degenerate into bribes." *See* 93 Cong. Rec. 4805 (1947), *reprinted in* II NLRB Legislative History of the Labor-Management Relations Act, 1947, at 1305 *States v. Phillips*, 19 F.3d 1595 (11th Cir. 1994) (upholding criminal convictions of union officials who negotiated unlawful employer payments in the form of retroactive pension credit), *cert. denied*, 115 S. Ct. 1312 (1995);

Caterpillar, 107 F.3d at 1060 ("Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management") (dissent).

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401-531, which amended several sections of the LMRA, including Section 302. Congress intended to broaden the categories of persons affiliated with unions to whom the proscriptions of Section 302 would apply, *see* H.R. Rep. No. 741, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2424, 2469, and to make it applicable "to all forms of extortion and bribery in labor-management relations some of which may slip through the present law." S. Rep. No. 187, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2329. Indeed, the Conference Report noted that no person in a position of trust should "enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve," and that "no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330-31 (quoting ethical practices code of American Federation of Labor and Congress of Industrial Organization. "The Government which rests in labor unions the power to act as exclusive bargaining representative must make sure that the power is used for the benefit of workers and not for personal profit." *Id.* at 2331.

In sum, there is nothing in the legislative history to suggest that Congress believed that the process of collective bargaining could "save" otherwise potentially unlawful conduct under Section 302. To the contrary, Congress intended to prohibit *any* payment, including payments negotiated by the employees' exclusive bargaining representative, unless it fell within the Section 302(c) exception. The payments that the UAW negotiated in collective bargaining with Caterpillar—payments to full-time

union officials who are not working for Caterpillar—violate Section 302(a) and contravene the expressed intent of the legislation's drafters. Caterpillar's payments to full-time union officials would place such persons in a position in which their self-interest may "conflict with complete loyalty to those whom they serve," and cause responsible trade union officials to "have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." Thus, unless section 302(c)(1) applies, the sought-after payments violate Section 302(a).

II. THE THIRD CIRCUIT'S DECISION HAS EXPANDED THE SECTION 302(c)(1) EXCEPTION SO THAT IT EFFECTIVELY SWALLOWS THE PROSCRIPTIONS IN SECTION 302(a)

The Third Circuit did not find that the payments were exempted under a plain reading of Section 302(c)(1) or its legislative history. Rather, the Third Circuit interpreted the "by reason of" exception in Section 302(c)(1) to apply to the payments solely because they were negotiated in collective bargaining:

> We believe that the payments at issue here, while they were not compensation for hours worked in the past, certainly were "by reason of" that service. We reach this conclusion because the payments arose, not out of some "back-door deal" with the union, but out of the collective bargaining agreement itself.

Caterpillar, 107 F.3d at 1056. By extending the exception to payments made to grievance representatives who take "years, even decades, of paid union leave," and perform *no* work for the employer, simply because those payments are bargained for, the Third Circuit has so far broadened the scope of the exception that it has swallowed the prohibitions in Section 302(a).

None of the other courts of appeals to consider the scope of Section 302(c)(1) has applied the exception to payments not directly connected with the individual's past

service for the employer. Neither have they rationalized such payments because the payments were "negotiated" in collective bargaining. *See, e.g., Toth*, 883 F.2d at 1305 ("at some point, it is conceivable that a bargain struck by the union and the employer might yet violate section 302(a)—if, for example, the terms of compensation for former employment were clearly so incommensurate with that former employment as not to qualify as payments 'in compensation for or by reason of' that employment, or if the term vested so much discretion in the employer that the potential for undue influence created a clear section 302(a) violation"); *IBEW Local 2514 v. National Fuel Distribution Corp.*, 16 Emp. Ben. Cases (BNA) 2018 (W.D.N.Y. 1993).

Rather, the "by reason of" exception of Section 302(c)(1) has consistently been interpreted to encompass payments for past service that are not properly classified as "compensation." *Caterpillar*, 107 F.3d at 1058 (Mansmann, J., dissenting) (collecting cases). The federal courts have applied the "by reason of" exception to pensions, 401(k) plans, life and health insurance, sick pay, vacation pay, jury and military leave pay, and other fringe benefits to which all employees may be entitled "by reason of" their service. *See United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994) ("by reason of" exception applies to fringe benefits "such as vacation pay, sick pay and pension benefits"), *cert. denied*, 115 S. Ct. 1312 (1995); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (2d Cir. 1986) ("by reason of" payments include "vacation pay, sick pay, paid leave for jury duty or military service, pension benefits and the like"); *see also Toth v. USX Corp.*, 883 F.2d 1297, 1303 n.8 (7th Cir.) (severance pay and payments to disabled employees are "by reason of" former employment), *cert. denied*, 493 U.S. 994 (1989).

Without the "by reason of" exception for past service, these payments would be illegal if paid to any employee

or former employee who worked full-time for a union because they could not be considered "compensation" from the employer. This exception in its traditional application serves a salutary purpose. Labor-management relations in the workplace would be imperiled if employees who were given time off with pay to process grievances would lose the right to these benefits simply because they worked part-time, or took short periods of leave under the employer's policy to serve as a union official. As the dissent in *Caterpillar* recognized, "[s]ection 302 (c)(1) plainly exists to enable company employees to obtain what is rightfully theirs. In other words, the section 302(c)(1) exception does not entitle union representatives to receive payments *because of* their service to the union; the exception allows union representatives to receive payments *in spite of* their current service for the union." *Caterpillar*, 107 F.3d at 1059 (Mansmann, J., dissenting).

Until the Third Circuit's decision, the linchpin between lawful conduct and employer payments has always been that the employee must receive the compensation or other payments because of his or her service for the employer. *Caterpillar*, 107 F.3d at 1059, citing *Phillips*, 19 F.3d at 1575 ("by reason of" payments "from an employer to a union official must relate to services actually rendered by the employee"), *id.* (under plain meaning of exception, "payment given to *former* employee must be for services he rendered *while he was an employee*"); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1049 ("by reason of" payments are those "occasioned by the fact that the employee has performed or will perform work for the employer, but which is not payment directly for that work") and at 1050 ("The exception permits only compensation for or by reason of 'service as an employee'; a union official who, though on the employer's payroll, performed no service as an employee, would not be within § 302(c)(1)'s exception"); *Reinforcing Iron Workers*

Local Union No. 426 v. Bechtel Power Corp., 634 F.2d 258, 261 (6th Cir. 1981) (under "literal construction" of section 302, payment to industry steward who performs services for the union, not employer, are unlawful).

After the Third Circuit's decision, there is no legal distinction between the arrangement in *Caterpillar* and an arrangement in which an employer agrees to pay the salaries and fringe benefits for full-time union officers or agents who have not worked actively for five, ten, or fifteen years. For example, the Third Circuit's interpretation may give unions—on threat of strike or other economic pressure, or as a negotiated trade-off for other terms and conditions in the collective bargaining agreement—the power to demand employer payments to full-time union officials so long as those officials worked for the employer at some point in time. According to the Third Circuit, as long as the payment is "by reason of" the official's past service for the employer and the employees agreed to it in collective bargaining, it is lawful under Section 302(a). That interpretation is not supported by the legislative history, the plain reading of the statute, or any of the cases previously decided in the other circuits. Further, that interpretation invites the abuse of the collective bargaining process which Congress sought to address through Section 302 and which would be inimical to fundamental principles of labor law and policy.

In effect, the Third Circuit's interpretation legitimizes virtually any type of payment from the employer to a union official so long as the payment is negotiated and ratified in a collective bargaining agreement. That interpretation would so eviscerate Section 302 as to render it a nullity, once again leaving the collective bargaining process ripe for abuse.

III. ENFORCING THE PLAIN WORDING OF SECTION 302(a) TO PROHIBIT EMPLOYER PAYMENTS TO FULL-TIME UNION OFFICIALS WHO PERFORM NO WORK FOR THE EMPLOYER WILL *NOT* CREATE DISLOCATION IN LABOR-MANAGEMENT RELATIONS SINCE, UNLIKE THE TYPICAL, MORE LIMITED "NO-DOCKING" ARRANGEMENTS AUTHORIZED BY SECTION 8(a)(2) FOR CURRENT EMPLOYEES, SUCH PAYMENTS ARE NOT COMMON IN INDUSTRY

By continuing to blur the distinction between typical "no-docking" arrangements and the types of payments at issue here, respondent UAW persists in the highly misleading suggestion that the challenged payments are commonplace in collective bargaining agreements throughout industry and, therefore, proscribing such payments under Section 302 would lead to massive upheaval in labor relations. *See* Resp. Br. Opp. Cert. at 2-4. In fact, authorities relied upon by respondent UAW demonstrate to the contrary that employer payments to full-time union officials are *rare* in the private sector. *See* U.S. Department of Labor, "Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business," Bulletin 1425-19 (1980) ("U.S. Dept. of Labor Bulletin"). The types of payments to union representatives which are challenged here are unlike typical "no-docking" arrangements where current employees are permitted paid time away from their normal work assignments to attend to union business on an intermittent "as needed" basis.

The U.S. Department of Labor has found that private sector employees who take leaves of absence to work full time as union representatives, and no longer perform for the employer, are usually *not* paid by their employer.

> Although employer-paid leave of absence for union business is fairly common in public sector agreements, only a relative handful of agreements in private industry allow such paid leave.

U.S. Dept. of Labor Bulletin, p. 5; *Accord*: U.S. Dep.t of Labor Bulletin, p. iii ("usually *unpaid* leave of absence granted"); p. 1 ("leave of absence [is] usually *unpaid*"); p. 2 ("leave of absence generally *unpaid*); p. 20 ("union representative must obtain a formal, and generally *unpaid* leave of absence . . . . Unions usually pay these officials"); p. 25 ("During union leave of absence, the employer generally has no responsibility to continue the employee's wages"); p. 29 ("Company pay for employees on leave to hold *full-time* union positions [is] *rare*.") (emphasis added). The U.S. Department of Labor's research indicates that in "less than one percent" of the agreements that permit employees to take leaves of absence to accept a full-time union position is there a requirement to retain the union official on the payroll. U.S. Dept. of Labor Bulletin, p. 29.

Since "no-docking" arrangements are not being challenged here, it begs the question that "virtually every labor agreement to which UAW is a party" includes grievance handling procedures, that "no-docking" provisions were "first included in the Caterpillar-UAW agreement in 1942," and that as of 1980 "the number of industrial agreements containing such provisions had grown to nearly two-thirds" (citing 1980 U.S. Dept. of Labor Bulletin, p. 32). Resp. Br. Opp. Cert at 2. Those agreements referred to by respondent UAW are not at risk. In fact, using the U.S. Department of Labor's statistics, only a small percentage of private sector industrial agreements—a "handful"—would be affected by a proscription on the type of "full-time, paid union official" arrangement at issue here. This would hardly lead to massive dislocation in labor relations suggested by the grossly exaggerated claims of respondent UAW and *amicus* AFL-CIO before the Third Circuit. See AFL-CIO Br. (3d Cir.), p. 4 ("forbidding this common practice will have a profoundly unsettling effect on the typical grievance procedure."); p. 22 ("virtually every collectively bargained grievance

procedure will have to be immediately and substantially revised.")

The dissents below debunk such false claims by pointing to the practical and legal differences between the two types of "no-docking" arrangements. *Caterpillar*, 107 F.3d at 1057. It would not cause discord in labor-management relations to proscribe employer payments to full-time union officials who perform no work for the employer, while privileging payments to current employees who take intermittent leaves of absence to conduct union business. The distinction would be consonant with the policies underlying Section 302, consistent with industry practice (including the modern trend to involve employees, both represented and unrepresented, in workplace dispute resolution), clearly understood by the parties, and easily enforced by the government and the courts.

IV. EXPANDING THE NARROW INTERPRETATION OF THE SECTION 302(c)(1) EXCEPTION TO ENCOURAGE EMPLOYER PAYMENTS TO FULL-TIME UNION OFFICIALS WHO PERFORM NO WORK FOR THE EMPLOYER *WILL* CREATE DISLOCATION IN LABOR-MANAGEMENT RELATIONS IN WAYS INIMICAL TO COLLECTIVE BARGAINING AND SOUND NATIONAL LABOR POLICY, AND *MAY* CAUSE SUBSTANTIAL UNCERTAINTIES AND WORKPLACE *DISRUPTIONS UNDER OTHER EMPLOYMENT LAWS*

COLLE is concerned that the Third Circuit's "full-time union official" exception to Section 302(a) will reopen the door to the types of corrupt practices, self-dealing, and conflicts of interest which Congress proscribed as inimical to collective bargaining. Under the Third Circuit's interpretation, Section 302(c)(1) now provides fertile ground for corruption by pemitting union officials who perform no work for the employer to negotiate special wages and benefits applicable to themselves alone on the basis that they once worked for the emloyer.

The Third Circuit's decision bases its holding, in part, on the argument that "the payments [to union representatives] arose, not out of some 'back-door deal' with the union, but out of the collective bargaining agreement itself, "*Caterpillar*, 107 F.3d at 1056, and "on which each employee has the opportunity to vote." *Id.* at 1057. Yet, ratification of the agreement by bargaining unit employees does not remove the taint from either the appearance or the fact of conflict of interest. Even in those unions which submit agreements to ratification, rank-and-file bargaining unit employees will not be privy to the subtleties of negotiations reflecting what may have been traded off against their interests in exchange for special wages and benefits for union officials. Thus, while such arrangements may not be "back-door deals," they certainly will not be in "plain view". The Third Circuit's decision below is oddly out-of-step at a time when this Court and others are demanding greater union accountability to their rank-and-file membership, *see, e.g., Communications Workers of America v. Beck*, 487 U.S. 735 (1988), and when the evils of diverting union funds for personal election to union office are splashed in national headlines and debated in Congress.

In its *amicus curiae* brief before the Third Circuit, the U.S. Department of Labor expressed similar concerns that the arrangements at issue here could lead to the types of corrupt practices which are in the zone of proscribed activities under Section 302. At the very least, the Government's brief conceded, such employer payments would demand the Department's "special scrutiny" in enforcing Title II of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 431 *et seq.* For example, the Government's brief acknowledged that "[p]ayments to an individual who has not worked for the company in his regular job for an extended period of time, and who is unlikely ever to return to such work, also warrant special scrutiny." Gov. Br., p. 27. The Government's brief also conceded that "there may well be a violation of Section 302 . . . [if] the terms of compensation for former em-

ployment were clearly so incommensurate with that former employment as not to qualify as payments 'in compensation for or by reason of' that employment." Gov. Br., p. 26. See *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989).

As the Government's unworkable "special scrutiny" balancing test [3] implicitly concedes, the corrupting influence of employer payments which are clearly proscribed by Section 302 is only different by degree from the potentially corrupting influence of such payments to full-time union representatives who perform no work for the employer. Yet, the Third Circuit's decision does not even go that far; it simply dismisses any concern for the potentially corrupting influence of such payments on the theory that bargained-for arrangements do not pose the same kind of harm as bribery, extortion and other corrupt pactices conducted in secret.[4] *Caterpillar*, 107 F.3d at 1057. As a result, by disregarding the Government's concerns, the Third Circuit's blanket endorsement of such practices will embolden labor and management to "negotiate" in exchange for other concessions all manner of special payments and benefits that apply *only* to union officials *e.g.*, an expanded leave of absence policy only for union officials, retroactive pension credit solely for union officials; special wages negotiated solely for union officials that are incommensurate with those negotiated for current employees and with the union representative's own former salary

[3] As the dissent below observes, the complex balancing test advocated by the Government is more properly for legislative, not judicial consideration. *Caterpillar*, 107 F.3d at 1073 (dissent).

[4] The Third Circuit turns a blind eye to the payments at issue because it believes that such payments are the result of arms-length bargaining and, therefore, not the type of "corrupt practices" Congress intended to proscribe. That ignores the fact that Section 302 is written *in malum prohibitum* which requires no "corrupt purpose" or "evil intent." *United States v. Ryan*, 350 U.S. 299, 305 (1956); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973). The prohibition is not altered by the parties' good intentions, salutary purposes, or the alleged beneficial effects on labor-management relations.

with the employer. As the dissent states, the Third Circuit "has embarked on a slippery slope that will legitimize any type of payment from the employer to the union so long as the payment is negotiated and included in the collective bargaining agreement." *Id.* at 1062.

Employers want to be shielded from the types of strong-arm "negotiating" tactics that may result from the Third Circuit's open invitation for unions to demand special payments to full-time union officials who perform no work for the employer. Similarly, unions should want to be shielded from an unscrupulous employer's seductive "negotiating" tactics, and from the impropriety, or appearance of impropriety, of accepting special payments for union officials. These dual concerns are shared by the U.S. Department of Labor, which has admitted that under such arrangements the union "may use its bargaining power or concede on some issue important to management to recure the desired union business provisions." U.S. Dept. of Labor Bulletin, p. 1. To the extent that such unchecked abuse occurs, or could occur, the integrity of the collective bargaining process would be compromised in ways Congress intended to proscribe.

Employer payment of a full-time union official's salary and benefits also raises other potentially disruptive issues as a result of the official's putative status as an "employee" under various employment laws. *Cf. NLRB v. Town & Country Electric, Inc.*, —— U.S. ——, 116 S.Ct. 450 (1995) (paid union organizers are "employees" under the NLRA where they perform current services for the employer under the employer's direction and control.) For example, who is the employer responsible for the union official's conduct toward employees under racial and sexual harassment guidelines of Title VII of the Civil Rights Act of 1964? Although the union officials here are maintained on Caterpillar's current payroll, the company has no direct control over the union official except for reporting time. Yet, under EEOC guidelines, employee status is determined, in part, by whether the em-

ployee is on the company's payroll. EEOC Notice No. N-915-052, Policy Guidance: Whether Part-Time Employees are Employees (Apr. 1990), at 24, *reprinted in* 3 EEOC Compl. Man. (BNA), at N:3311; see *Walters v. Metropolitan Educ. Enters., Inc.*, —— U.S. ——, 117 S. Ct. 660, 136 L.Ed.2d 644 (1997).

Similarly, although Caterpillar has no control over its "former employees" serving as full-time union representatives, who is the responsible employer for workers' compensation claims if the union representative is injured "at work"? Is Caterpillar obligated to reasonably accommodate the disability of the former employee/full-time union official under the Americans With Disabilities Act? 42 U.S.C. § 12101 *et seq.* Where the company has no authority to direct the work hours of the former employee/full-time union official, who is responsible for overtime violations under the Fair Labor Standards Act? 29 U.S.C. § 201 *et seq.* What if the former employee/full-time union official refuses to wear a hard hat or comply with other safety standards while processing grievances and conferring with production employees in the plant, is the company subject to an OSHA citation and any assessed penalty? See Occupational Safety and Health Act, 29 U.S.C. § 553 *et seq.* Is the company responsible for granting FMLA leave requests of the former employee/full-time union official under Family and Medical Leave Act? 29 U.S.C. § 2601-54.

It is for such reasons that Congress, not the courts, is best suited to consider the impact of expanding the scope of an exemption under the LMRA in ways which are at odds with its plain terms and clear legislative history. Not only is the LMRA itself a carefully-crafted, interdependent balance of rights and obligations for labor and management, such that changing one section will have an effect on other sections, but its provisions also have consequences for other workplace laws. Congress, not the courts, is best suited to consider and harmonize the overlapping, cumulative effect of such changes. It is for Congress,

not the courts, to create exceptions or qualifications at odds with the LMRA's plain terms. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947); *Caterpillar*, 107 F.3d at 1058 (dissent).

If there is merit in respondent UAW's argument that the practice of employer payments to full-time union officials who perform no work for the employer is beneficial for labor-management relations, that position is best advocated and debated before Congress. Congress is best suited to harmonize that change, for example, with featherbedding provisions [Section 8(b)(6)] and other sections of the National Labor Relations Act. Just as other groups currently advocate before Congress the adoption of certain legislative changes in the "company domination" section of the Act, 29 U.S.C. § 158(a)(2), in order to permit and promote broader involvement in employer-employee workplace committees, [see "Teamwork for Employees and Managers (TEAM) Act of 1997," S. 295. (105th Cong., 1st Sess.)], so, too, respondent UAW is certainly familiar with how to seek expansion of the Section 302(c)(1) exception and Section 8(a)(2) "no-docking" proviso in Congress, as well.

CONCLUSION

For the foregoing reasons, the Council on Labor Law Equality urges the Court to reverse the judgment of the United States Court of Appeals for the Third Circuit or to enter an appropriate modifying order.

Respectfully submitted,

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